LIBRARY
SUPREME COURT, U. S.

No. 73-619

FILED
NOV 29 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

SAVE OUR CUMBERLAND MOUNTAINS, INC., ET AL.,
PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

ROBERT H. MARQUIS,
General Counsel,
Tennessee Valley Authority.

HERBERT S. SANGER, JR.,
Deputy General Counsel,

JUSTIN M. SCHWAMM,
Assistant General Counsel,
Tennessee Valley Authority,
Knoxville, Tennessee 37902.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-619

SAVE OUR CUMBERLAND MOUNTAINS, INC., ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners' complaint in the United States District Court (Pet. App. 5a-16a) sought an injunction prohibiting the Tennessee Valley Authority ("TVA") from accepting delivery of coal which had been transported by independent coal contractors in trucks loaded in excess of the maximum weights prescribed by Tennessee statutes.[1] Petitioners also sought a

[1] The statutes involved, Tenn. Code Ann. Secs. 59-1108, 59-1109, 59-1111, and 59-1112 (1968; Supp. 1972), are reprinted in the Appendix to this memorandum. In addition to criminal penalties these statutes provide that:

Any taxpayers of the state shall have the right by in-

writ of mandamus ordering TVA to reject all coal deliveries in trucks which are overloaded under the Tennessee statutes.

The complaint does not allege that TVA itself violated the Tennessee weight statutes in any manner. On the contrary, the complaint specifically alleges that the "road damage [is] caused by the continuous operation of illegal, overweight coal trucks by TVA contractors" (Pet. App. 7a).[2]

The district court dismissed the complaint (Pet. App. 3a-4a), stating in part:

> The gravamen of the complaint is the failure of T.V.A. to enforce a state statute against a non-party to this action. The facts alleged do not remotely suggest that T.V.A. is violating any federal right or immunity. * * * The Governor of Tennessee is charged with the responsibility for enforcing state laws, not the T.V.A. [Pet. App. 4a].

The Sixth Circuit affirmed "for the reasons set forth" by the district court (Pet. App. 1a).

The courts below properly dismissed the complaint.

1. The district court did not have jurisdiction under 28 U.S.C. 1331(a) since that section requires that the matter in controversy arise "under

---

junction proceedings to enjoin any actual or threatened use of any highway prohibited by [the weight limitation provisions of the statute].

[2] In the court of appeals, petitioner admitted that the coal did not become TVA's until it "was unloaded at the plant" (Appellants' brief 5).

the Constitution, laws, or treaties of the United States." Here, the principal objective of the complaint—in petitioners' words, their "overriding claim" (Pet. 7)—is to prevent the movement of overweight coal trucks by private parties on Tennessee's highways in violation of Tennessee criminal law. All "federal questions" sought to be raised are incidental to that objective and asserted only as a means of achieving it, and no federal law is an essential element of petitioners' case.

In such a situation no federal question is presented. Thus, in *Gully* v. *First Nat'l Bank*, 299 U.S. 109, cited by the district court, this Court said:

> To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.
>
> * * * *
>
> * * * We recur to the test announced in *Puerto Rico* v. *Russell & Co.*, *supra* [288 U.S. 476]: "The federal nature of the right to be established is decisive * * *" [299 U.S. at 112, 116].

Accord, *Pan Am. Corp.* v. *Superior Court*, 366 U.S. 656, 663-664; *Autry* v. *Crumpler*, 377 F.2d 547 (C.A. 4).

Petitioners' claim that TVA failed to comply with the National Environmental Policy Act by not including in a specified environmental impact statement (see Pet. App. 12a) a detailed discussion of the acceptance of coal deliveries by private contractors presents a question only incidental to the principal ob-

jective of this litigation as to which, under *Gully*, there is no federal jurisdiction. Moreover, petitioners did not seek any relief under NEPA concerning this statement and advanced no contention that TVA was required to file a separate environmental impact statement, as they now do in their petition to this Court.[3] Further, on the same day the district court dismissed petitioners' complaint, petitioners (and others) filed a new action in that court challenging directly the adequacy of that environmental statement. That case has been tried and judgment entered in TVA's favor. *Natural Resources Defense Council* v. *Tennessee Valley Authority*, 5 ERC 1316 (E.D. Tenn.), 5 ERC 1669 (E.D. Tenn.), notice of appeal filed. Thus there is no need for further review of that question in this case.

2. The mandamus statute, 28 U.S.C. 1361, confers no jurisdiction but merely provides a remedy in cases where federal jurisdiction exists on some other basis. *Rural Electrification Admin.* v. *Northern States Power Co.*, 373 F.2d 686, 694 n.14 (C.A. 8), certiorari denied, 387 U.S. 945; *Iowa City-Montezuma R.R. Ship. Ass'n* v. *United States*, 338 F. Supp. 1383, 1386 n.1 (S.D. Iowa). Moreover, mandamus is available only to enforce performance of a ministerial duty owed to the petitioners. *Panama Canal*

---

[3] NEPA, of course, deals only with "federal actions" and not with private actions such as the violation of state laws by private contractors. Cf. *Civic Improvement Comm.* v. *Volpe*, 459 F.2d 957, 958 (C.A. 4); *Bradford Township* v. *Illinois State Toll Hwy. Auth.*, 463 F.2d 537 (C.A. 7), certiorari denied, 409 U.S. 1047.

Co. v. *Grace Line, Inc.*, 356 U.S. 309, 317-318; *McQueary* v. *Laird*, 449 F.2d 608, 611 (C.A. 10); *United States* v. *Walker*, 409 F.2d 477, 481 (C.A. 9); *Carter* v. *Seamans*, 411 F.2d 767 (C.A. 5); *Davis* v. *Shultz*, 453 F.2d 497, 502 (C.A. 3). Neither the TVA Act nor any other statute imposes on TVA any duty, much less a ministerial one, to determine whether contractors have violated state laws before accepting shipments from them. The adoption of a policy of doing so, as petitioners request, would be discretionary, and mandamus accordingly will not lie to require it. *Panama Canal Co.* v. *Grace Line, Inc., supra; Town of East Haven* v. *Eastern Airlines, Inc.*, 282 F. Supp. 507, 512 (D. Conn).[4]

3. Even if the district court had jurisdiction, it properly abstained from exercising it. Where the petitioners, as in this case, have an adequate state remedy in a state court under a state statute, federal jurisdiction should not be accepted. *Wilson* v. *Schnettler*, 365 U.S. 381; *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341; *Simmons* v. *Jones*, 478 F.2d 321 (C.A. 5); *Burks* v. *Perk*, 470 F.2d 163

---

[4] As is pointed out in petitioner's complaint (Pet. App. 11a, Nos. 17 and 18), TVA did at one time attempt to require contract provisions under which it could reject overweight shipments under its short-term contracts but was met with charges of discrimination because long-term contracts with major producers were still in effect without such clauses. There were no such provisions in effect in any contracts when this suit was filed. Rejection of coal shipments would thus have subjected TVA to breach-of-contract claims by the contractors, none of which was named as a defendant in

(C.A. 6); *Southern Ry.* v. *Chambers*, 376 F.2d 815 (C.A. 6), certiorari denied, 389 U.S. 830; *Porto Rico Tel. Co.* v. *Puerto Rico Commun. Authority*, 189 F. 2d 39 (C.A. 1), certiorari denied, 342 U.S. 830; *Johnson* v. *Riverland Levee Dist.*, 117 F.2d 711 (C.A. 8).

Petitioners may object to the private truckers' violation of state law, but, as the district court correctly pointed out, it is the state's responsibility to enforce that law, and petitioners have an available state law remedy in the state courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

ROBERT H. MARQUIS,
General Counsel,
Tennessee Valley Authority.

HERBERT S. SANGER, JR.,
Deputy General Counsel,

JUSTIN M. SCHWAMM,
Assistant General Counsel,
Tennessee Valley Authority.

NOVEMBER 1973.

---

this suit. See *Stansell* v. *Roach*, 147 Tenn. 183, 191, 246 S.W. 520, 522; *Virginia Surety Co.* v. *Knoxville Transit Lines*, 135 F. Supp. 606, 613 (E.D. Tenn.); *Macco Const. Co.* v. *Farr*, 137 F. 2d 52 (C.A. 9).

APPENDIX

TENNESSEE CODE ANNOTATED
(10A Tenn. Code Ann. (1968; Supp. 1972))

59-1108. Maximum width and height.—No motor vehicle as defined in § 59-103 or any trailer or semi-trailer, whose width, including any part of the load, exceeds eight (8) feet (that is, four (4) feet on each side of the center line of the vehicle) or whose height, including any part of the load, exceeds thirteen and one-half (13½) feet, shall be operated on any highway, provided, that the provisions of this section shall not apply to farm tractors or farm machinery temporarily moving on any highway. In the event federal law and regulations thereunder permit the operation of passenger buses of widths in excess of eight (8) feet on the national systems of interstate and defense highways, then there may be operated on four lane highways and, for the purpose of ingress and egress to terminal facilities, such other highways as are designated and approved by the Tennessee commissioner of highways within the state of Tennessee passenger buses, the width of which do not exceed eight (8) feet six (6) inches, or such width, not exceeding eight (8) feet six (6) inches, as is permitted under such federal rules and regulations.

59-1109. Maximum weight per single axle or group of axles allowed.—Except as otherwise provided by law, no freight motor vehicle shall be operated over, on, or upon the public highways of this state where the total weight on a single axle, or any group of axles, exceeds the weight limitations set forth below in subsections A, B, C, D, E, and F.

A. No axle shall carry a load in excess of eighteen thousand (18,000) pounds, provided that no front axle on truck tractors as defined in § 59-104 shall carry a load in excess of twelve thousand (12,000) pounds.

Axle combinations and fifth wheel placement on the tractor shall insure equal weight distribution on weight carrying axle combinations and such axle combinations shall be equipped with brakes having power motivation.

An axle load as set out herein is defined as the total load transmitted to the road by all wheels whose centers may be included between two (2) parallel transverse vertical planes, forty (40) inches apart, extending across the full width of the vehicle.

B. The total gross weight concentrated on the highway surface from any tandem axle group shall not exceed thirty-two thousand (32,000) pounds for each such tandem axle group. A "tandem axle group" is defined to be two (2) or more axles spaced forty (40) inches or more apart from center to center having at least one (1) common point of weight suspension.

C. No freight motor vehicle, truck tractor, trailer or semitrailer, nor combinations of such vehicles, shall be operated over, on, or upon the public highways of this state where the total gross weight of such vehicle, or combination thereof including the load thereon, exceeds seventy-three thousand two hundred eighty (73,280) pounds, except such vehicles, or combinations thereof, operate under special permits now authorized by law; provided, that wherever a maximum permissive gross weight of seventy-three thousand two hundred eighty (73,280) pounds

or a length of fifty (50) feet or a height of thirteen and one-half (13½) feet is authorized for any vehicle or combination of vehicles, it is the legislative intent that the prescribed weight, height and length limit shall be strictly enforced and it shall be unlawful for any state, county, or municipal officer to allow or permit any additional weight, height or length by way of tolerance or otherwise, except that the commissioner of highways may issue special permits as provided by § 59-1111.

D. A freight motor vehicle, as used in this section, includes both the tractor or truck and the trailer, semitrailer or trailers, if any, and the weight of any such combination shall not exceed the maximum fixed herein; provided, however, that no freight motor vehicle with motive power shall haul more than one (1) vehicle.

E. No freight motor vehicle shall haul a trailer on any highway of this state when such trailer (including its load) weighs more than thirty-five hundred (3,500) pounds, and the hauling of a trailer which, including its load, weighs more than thirty-five hundred (3,500) pounds is hereby prohibited and declared unlawful. For the purposes hereof a trailer is defined as a vehicle without motive power designed or used for carrying freight or property wholly on its own structure, provided, however, that it shall not be unlawful for any motor vehicle subject to §§ 59-1107-59-1112 to have a semitrailer, which, for the purposes hereof, is defined as a vehicle for the carrying of property or freight and so designed that some part of the weight of such semitrailer or its load rests upon or is carried by the motor vehicle to which it is attached. Provided, that

the hauling of a trailer (to the extent herein permitted) or a semitrailer, shall be subject to the further provisions hereof. Provided, further, that said §§ 59-1107-59-1112 are not intended to prohibit the movements of spools carrying wire or cable, when used for construction or repair purposes. Provided, further, that the weight limitation respecting trailers shall not be applicable to implements designed to distribute fertilizer while such vehicles are being drawn by a freight motor vehicle between the plant and the farm.

59-1111. Special permits for moving vehicles of excess weight or size—Reduction of weight and size regulations—Signs indicating.—The commissioner of highways shall have the authority to grant special permits for the movements of freight motor vehicles carrying gross weights in excess of the gross weights set forth in § 59-1109 or dimensions in excess of the dimensions set forth in §§ 59-1107, 59-1108. The commissioner of highways shall have the authority to reduce the maximum gross weight of freight motor vehicles operating over lateral highways and secondary roads where through weakness of structure in either the surface of or the bridges over such lateral highways or secondary roads, the maximum loads provided by law, in the opinion of the commissioner, injure or damage such roads or bridges. The appropriate county officials shall have the same authority as to county roads.

The commissioner of highways shall at each bridge and on each lateral highway or secondary road post signs indicating the maximum gross weight permitted thereon; and it shall be unlawful to operate any freight motor vehicle thereon with a gross weight

in excess of such posted weight limit and any person violating said rules and regulations of the commissioner of highways upon such secondary or lateral roads shall be punished as in case of the commission of a misdemeanor.

The commissioner of safety shall, with the approval of the governor, provide means and prescribe rules and regulations governing the weighing of freight motor vehicles as herein defined, which rules and regulations may make allowances for differentials in weight due to weather conditions.

The commissioner of highways shall prescribe by orders of general application, rules and regulations for the issuance and/or renewal (without cost to the applicant) of such special permits for stated periods not exceeding one (1) year, for the transportation of such oversize, overweight, or overlength articles or commodities as cannot be reasonably dismantled or conveniently transported otherwise, and for the operation of such super-heavy or overweight motor trucks, semitrailers and trailers, whose gross weight, including load, height, width, or length, may exceed the limits prescribed herein, or which in other respects fail to comply with the requirements of the Code, as may be reasonably necessary for the transportation of such oversize, overweight, or overlength articles or commodities as cannot be reasonably dismantled or conveniently transported otherwise.

Said permit shall be issued and may be renewed only upon such terms and conditions, in the interest of public safety and the preservation of the highways, as are prescribed in said general rules and regulations promulgated by such orders of the commissioner.

Said rules and regulations so prescribed by the commissioner shall require, as a condition of the issuance of such permit, that the applicant shall agree to and give bond with surety (unless the applicant shall by sworn statement furnish satisfactory proof of his solvency to the authority issuing the permit) to indemnify the state and/or counties thereof, against damages to roads, or bridges, resulting from the use thereof by the applicant. Each such permit and bond, if the commissioner so authorizes, may cover more than one (1) motor vehicle operated by the same applicant. The operation of motor trucks, tractors, semitrailers or trailers, in accordance with the terms of any such permit shall not constitute a violation of §§ 59-1107-59-1112, provided the operator thereof shall have said permit, or a copy thereof, authenticated as the commissioner may require, in his possession. The operation of any motor truck, semitrailer or trailer, in violation of the terms of such permit, shall constitute a violation of law punishable under § 59-1112.

The authority issuing such permits shall have the right to revoke the same at any time in the event in the use of the same the holder of such permit shall abuse the privilege given thereby, or otherwise make wrongful use of the same. The authorized county authorities (as well as the commissioner) may issue permits, but always consistently with said rules and regulations, prescribed by the commissioner, for movements over any and all roads (except city streets) within the limits of the county for which they are acting.

59-1112. Penalty for violation of §§ 59-1107-59-1111—Injunction proceedings—Disposition of fines,

penalties and forfeitures.—Each violation of §§ 59-1107-59-1109 and each violation of restrictions on the maximum gross weight of freight motor vehicles duly adopted and promulgated by the commissioner of highways, under § 59-1111, and each violation of rules and regulations duly adopted and promulgated by the commissioner of safety under said section, shall be a misdemeanor and, upon conviction thereof, a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500) shall be assessed. Any taxpayers of the state shall have the right by injunction proceedings to enjoin any actual or threatened use of any highway prohibited by said sections. All fines, penalties and forfeitures of bonds imposed or collected under this section shall be paid over within ten (10) days after receipt thereof to the department of safety with a statement accompanying the same, setting forth the action or proceedings in which such moneys were collected, the name and residence of the defendant, the nature of the offense, and fine, penalty, or forfeiture imposed. Provided, however, where said fines, penalties and forfeitures are imposed because of arrests made by employees of the department of revenue, the same shall be paid over immediately to the commissioner of revenue, who is authorized to take all steps necessary to enforce the collection and prompt return thereof. Such fines, penalties and forfeitures when so collected by either the department of safety or the commissioner of revenue shall be deposited with the treasurer of the state and shall become a part of the general funds of the state.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 527088 130